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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOHN CODY, ROBERT SASSO, JOHN DEE, WILLIAM ARGENTO, RALPH GUERCIA, HERBERT SCHNEIDER, and LOUIS NAPPI,

Petitioners,

vs.

RAYMOND J. DONOVAN, Secretary of the United States Department of Labor, and TED KATSAROS, JOHN KUEBLER, ROBERT TROTT, LAWRENCE KUDLA, and CHARLES CURD,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS TED KATSAROS, JOHN KUEBLER, ROBERT TROTT, LAWRENCE KUDLA, and CHARLES CURD.

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TABLE OF CONTENTS

	Page
Table of Authorities	iii
Opinions Below	2
Jurisdiction	4
Questions Presented	4
Statutes Involved	7
Statement of the Case	8
The Green Loan and Expenditures	8
The Des Plaines Bancorporation Loan	11
Other Unlawful Activities	18
Relevant Procedural Background	19
Reasons for Denying the Writ	23
I. The severance of the Petitioners' third-party claims from the Respondents' equitable claims was neither an abuse of discretion nor a violation of Petitioners' right to a trial by jury.	23
A. The Trustees Waived Their Right To A Jury Trial.	23
B. Even If Petitioners Had Not Waived A Jury Trial They Were Not Entitled To One.	25

Page

1. The Severance Of The Main Action From The Third-Party Action Was Proper. 25

2. The Claims In The Main Action Were Purely Equitable In Nature. 27

3. The Severance Of The Third-Party Action Did Not Deny Petitioners Their Right To A Jury Trial. 28

II. The relief granted by the District Court and affirmed by the Court of Appeals was well within its discretion and was permitted by ERISA. 32

A. Removal Of The Trustees For Repeated Egegrious Violations Of The ERISA Fiduciary Standards Was Warranted. 37

B. The Calculation Of Prejudgment Interest Was A Proper Exercise Of The District Court's Discretion. 39

C. The District Court Did Make Proper Provision For Set-Offs. 42

D. The Relief Granted Was Appropriate And Was Not Punitive. 43

Conclusion 45

TABLE OF AUTHORITIES

Cases	Page
Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959)	4,23,29 30,31
Calamia v. Spivey, 632 F.2d 318 (5th Cir. 1980)	27
Consolidated Express Inc. v. N.Y. Shipping Association, Inc., 602 F.2d 494 (3d Cir. 1979), vacated, 448 U.S. 902 (1980)	30
Crowder v. Lash, 687 F.2d 996 (7th Cir. 1982)	30
Donovan v. Bryans, 566 F. Supp. 1258 (E.D.N.Y. 1983)	39
Eaves v. Penn, 587 F.2d 453 (10th Cir. 1978)	34,35
Freund v. Marshall & Ilsley Bank, 485 F. Supp. 629 (W.D. Wis. 1979)	43
Gilliam v. Edwards, 492 F. Supp. 1255 (D.N.J. 1980)	39
Hall v. Cole, 412 U.S. 1 (1974)	36
In re Vorpahl, 695 F.2d 318 (8th Cir. 1982)	27
Iron Workers Local No. 272 v. Bowen, 624 F.2d 1255 (5th Cir. 1980)	34,37
Katchen v. Landy, 382 U.S. 323 (1966)	27,30

	Page
Katsaros v. Cody, 568 F. Supp. 360 (E.D.N.Y. 1983)	2,5
Katsaros v. Cody, 4 E.B.C. 2613 (E.D.N.Y. 1983)	3
Katsaros v. Cody, 4 E.B.C. 2698 (E.D.N.Y. 1984)	3
Marshall v. Kelly, 465 F. Supp. 341 (W.D. Okla. 1978)	34
Marshall v. Snyder, 572 F.2d 894 (2d Cir. 1978)	34,37
Marshall v. Teamsters Local 282 Pension Fund, 458 F. Supp. 986 (E.D.N.Y. 1978)	9,10,37
Moore v. U.S., 196 F.2d 906 (5th Cir. 1952)	24
Olund v. Swarthout, 459 F.2d 999 (6th Cir. 1972), cert. denied, 409 U.S. 1008 (1973)	24
Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979)	29,30
Railex Corp. v. Joseph Guss & Sons, Inc., 40 F.R.D. 119 (D.D.C. 1966), affirmed, 382 F.2d 172, 127 U.S. App. D.C. 230 (1967)	24
Ramsey v. United Mine Workers, 401 U.S. 302 (1971)	43
S.E.C. v. Commonwealth Chemical Sec., 574 F.2d 90 (2d Cir. 1978)	24

	Page
State Mutual Life v. Arthur Andersen & Co., 581 F.2d 1045 (2d Cir. 1978)	24
Trixler Brokerage Co. v. Ralston Purina Co., 505 F.2d 1045 (9th Cir. 1974)	24
U.S. v. Cody, 722 F.2d 1052 (2d Cir. 1983)	18,19
Walton v. Eaton, 563 F.2d 66 (3d Cir. 1977)	24
Ward v. Brown, 301 F.2d 445 (10th Cir. 1962)	24
Wardle v. Central States, Southeast & Southeast Areas Pension Fund, 627 F.2d 820 (7th Cir. 1980), cert. denied, 449 U.S. 1112 (1981)	27
Statutes	
28 U.S.C. § 1254(1)	4
28 U.S.C. § 1292(b)	2
29 U.S.C. § 412	36
29 U.S.C. § 1104	7,9
29 U.S.C. § 1105	7
29 U.S.C. § 1109	7,27,33
29 U.S.C. § 1132(a)	7,33

Rules	Page
Rule 12(b)(7), Federal Rules of Civil Procedure	2
Rule 38(b), Federal Rules of Civil Procedure	23
Other Authorities	
S. Rep. No. 93-127, 93rd Cong., 1st Sess., Reprinted [1974], U.S. Code Cong. & Admin. News, pp. 4838, 4871	34
S. Rep. No. 383, 93rd Cong., 2d Sess., Reprinted [1974], U.S. Code Cong. & Admin. News, pp. 4890, 4989	37
120 Cong. Rec. S-15737, August 22, 1974, Reprinted [1974], U.S. Code Cong. and Admin. News, pp. 5177, 5186	35

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Opinions Below

The opinion of the United States District Court for the Eastern District of New York (Mishler, D.J.) severing the third-party claims, striking the jury demands, denying cross-motions for summary judgment, denying defendants' motions to dismiss under Rule 12(b)(7), and striking the punitive damages claim, filed April 5, 1983, is not reported, and appears in the Appendix to the Petition ("Appendix") at 30a. The District Court's opinion denying defendants' motion for recusal and application for certification under 28 U.S.C. § 1292(b), filed April 15, 1983, is not reported, and appears in the Appendix at 50a. The District Court's opinion following trial on the merits, filed July 21, 1983, is reported as Katsaros v. Cody, 568 F. Supp. 360 (E.D.N.Y. 1983), and appears in the Appendix at 57a. The District Court's opinion dismissing the third-party complaint of the Local 282

Pension Trust Fund ("Pension Fund") and dismissing all but the fraud claims of the Pension Fund Trustees, filed on August 18, 1983, is not reported, and appears in the Appendix at 81a. The District Court's opinion setting the damages and awarding attorneys fees, filed on December 7, 1983, is reported as Katsaros v. Cody, 4 E.B.C. 2613 (E.D.N.Y. 1983) and appears in the Appendix at 98a. The District Court's opinion settling attorneys fees, filed on January 26, 1984, is reported as Katsaros v. Cody, 4 E.B.C. 2698 (E.D.N.Y. 1984), and appears in the Appendix at 112a.

The opinion of the United States Court of Appeals for the Second Circuit (Lumbard, Mansfield and Kearse C.JJ.), filed June 29, 1984, is not yet reported, and appears in the Appendix at 3a. The order of the Court of Appeals denying rehearing, filed on July 26, 1984, appears in the Appendix at 1a.

Jurisdiction

The decision of the United States Court of Appeals for the Second Circuit was entered on June 29, 1984. (A. 3a). The jurisdiction of this Court over the Petition rests on 28 U.S.C. § 1254(1).

Questions Presented

The Petition asks the Court to review the following questions:

1. Whether the court of appeals contravened the Seventh Amendment to the United States Constitution and this Court's decision in Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959), by affirming the district court's conduct of first severing "legal" third-party claims for which a jury trial had been demanded, from "equitable" main claims, and then conducting a bench trial of only the "equitable" claims without first trying the common factual issues between the "equitable" and "legal" claims before a jury.

The Court of Appeals, affirming the District Court, held that the District Court did not abuse its discretion in severing the third-party claims, since the main claims were ready for trial and the third-party claims were early in discovery; and held that the defendant Trustees were not entitled to a jury trial on the main claim since the plaintiffs sought only equitable relief. The District Court further held that the defendants had waived their right to a jury trial in Katsaros v. Cody.

2. Whether the unprecedented, excessive and unnecessarily punitive relief awarded by the district court, without ever hearing evidence relating to damages, and affirmed by the court of appeals, against the petitioner pension plan fiduciaries for making a single imprudent investment, including:(1) damages in the full amount of the loss ostensibly suffered by the pension

plan as a result of the imprudent investment, without considering any potential set-offs; (2) prejudgment interest at the above-prime rates that would have been realized by the imprudent investment; and (3) removal of the fiduciaries from their positions with not only the pension plan, but also its sister welfare, annuity and legal services trust funds, is justified under the Employee Retirement Income Security Act of 1974.

The Court of Appeals, affirming the District Court, found that the District Court did make provisions for potential set-offs against the amount to be paid by the Trustees in restitution (there was no award of damages to or against any party), and held that the District Court did not abuse its discretion in awarding prejudgment interest or removing the Trustees from their fiduciary positions. Petitioners did not raise the issue of "punitive

relief" in the Court of Appeals. Therefore, the question is not properly before this Court.

* * *

These questions are not worthy of certiorari; the decisions below are clearly correct, and there are no conflicts among the Circuits.

Statute Involved

This case involves the following provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"). 29 U.S.C. Section 1104: set forth in the Petition, pp. 2 and 3; 29 U.S.C. Section 1105: set forth in the Petition, p. 3; 29 U.S.C. Section 1109: set forth in the Petition, pp. 3 and 4; 29 U.S.C. Section 1132(a):

> A civil action may be brought ... (3) by a participant, beneficiary, or fiduciary (a) to enjoin any act or practice which violates any term or provision of this title, or the terms of the plan, or (b) to obtain other appropriate equitable relief

(i) to redress such violation or (ii) to enforce any provision of this title ...

Statement of the Case

The Green Loan and Expenditures[1]

In February 1978, at a time when the Pension Fund's assets were valued at approximately $55,000,000, the Trustees (except Ralph Guercia, who was not yet a Trustee) approved a $35,000,000 loan to Hyman Green ("Green"). Green was to use $20,000,000 to purchase ten acres of land in Las Vegas and to build a gambling casino on the site. Green also agreed to purchase from the Pension Fund certain financially unproductive property in Southampton, New York for $15,000,000; however, the Pension Fund was to grant him a purchase money

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1. Petitioners make little reference to the Green loan in their Petition. In fact, this loan and the injunction issued against it by Judge Mishler played a major role in bringing about the removal of the petitioners from their positions.

mortgage for the full amount of the price. As part of the loan agreement, Green assumed responsibility for the Pension Fund's expenses in arranging the loan transaction.

In April 1978, the United States Secretary of Labor commenced an action entitled Marshall v. Teamsters Local 282 Pension Fund, 78 Civ. 543 ("Marshall action"), seeking to enjoin the Pension Fund and its Trustees from making the loan to Green. In August 1978, the District Court (Mishler, J.) issued a decision and order in the Marshall action finding that the proposed loan to Green violated Section 404(a)(1)(B) and (C) of ERISA, 29 U.S.C. § 1104(a)(1)(B) and (C). 458 F. Supp. 986 (E.D.N.Y. 1978).

The court found:

> "The proposed loan as outlined in the commitment issued by the trustees violates 29 U.S.C. §1104(a)(1)(B) and (C) in the following respects which present extra-ordinary risks:

(a) The project may not be completed for lack of equity capital.
(b) The project may not be completed because of strikes, increase in cost of construction, or poor management of construction.
(c) If completed, the hotel business may fail because of poor management, competition, or adverse economic conditions, or Las Vegas may lose its lure to gamblers because of competition in other parts of the country if gambling is legalized in states where it is now forbidden.
(d) If completed, the gambling casino may fail because of poor management or adverse economic conditions or competition.
(e) Government guaranteed Jennie May certificates are available bearing approximately the same interest rate as provided in the permanent mortgage.
(f) The Southampton land is saleable at a price in excess of cost, and it is imprudent and improper for the trustees to use a risky loan as a means of selling the Southampton property at a price in excess of market value for the purpose of showing increased total assets of the funds, knowing that the sale price is in excess of market value. It smacks of gimmickry.
(g) The loan represents a disproportionate commitment of the assets of the fund and violates 29 U.S.C. § 1104(a)(1)(B) and (C) and the trust agreement."

458 F. Supp. at 991.

The Pension Fund incurred $23,473.57 in expenses in arranging the loan to Green. Although Green had agreed to reimburse the Pension Fund for its expenses, he did not do so.

The Des Plaines Bancorporation Loan

On February 27, 1979, only six months after the preliminary injunction was issued in the Marshall action, the Trustees (now including Ralph Guercia) voted to loan $2,000,000 to the Des Plaines Bancorporation (hereinafter "Bancorporation"), a small bank holding company in a Chicago suburb.[2]

Prior to the Trustees' meeting of February 27, 1979, only one Trustee, John Cody ("Cody"), was even aware that

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2. There was little explanation at trial as to how it came about that a small Chicago bank came to a Long Island Teamster pension plan for a loan. Given the clear impropriety of the loan, this suspicious connection did not require further exploration.

Bancorporation would appear at the meeting with a loan request. All that Cody knew were the bare terms as stated in a letter. At the meeting, Anthony Angelos ("Angelos"), the principal of Bancorporation, and Jonathan Howe ("Howe"), a Bancorporation director, distributed Bancorporation's statements, as well as those of its subsidiary, the Des Plaines Bank (hereinafter the "Bank") to the Trustees. Angelos's personal financial statement was also distributed.

The Trustees devoted a half hour to examining the financial materials, during which time they were "walked through" the statements by Howe, who pointed out "improvements" in the Bank's condition. None of the Trustees had any background in accounting or in reading the financial statements. The Pension Fund accountant, though present, considered himself unqualified to interpret and analyze the financial statement, and did not express an opinion

as to the financial soundness of Bancorporation or Bank.

After some discussion and amendment of the terms of the loan, the Trustees unanimously approved the loan subject to an eyewitness examination of the Bank's premises and some of the real estate put up as collateral. After visiting the property on March 1, 1979, Cody and Guercia signed the various loan documents and had the funds disbursed. Less than 48 hours had passed since the Angelos and Howe presentation. No independent professional examination of Bancorporation's or the Bank's financial statements was done. The Bank's stock, taken as security, was not appraised or valued, nor was the real estate.

The loan was to be repaid within four years, with semiannual installments of $125,000 plus interest. At the end of four years, a balloon payment of $1,125,000

was due. Interest was to be calculated at prime plus 1% with a 10% floor. [3]

Only $500,000 of the loan proceeds was to be used to increase the capital of the Bank. The rest was paid to various creditors, including Angelos. One of the Bank's creditors, the Central National Bank of Chicago ("Central National"), was due to be repaid $1,000,000 on March 1, 1979. Prior to March 1979, Central National refused to extend its loan (for the third time) and threatened to foreclose and take over the Bank.

Had Trustees sought the assistance of a professional familiar with banking finances, they would have learned of serious deficiencies in the financial standing of Bancorporation and the Bank, all of which were indicated by the financial

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3. Given the prime rate at the time, the semiannual interest and principal payments should have been expected to exceed $250,000.

statements:

(a) Bancorporation had an extremely low and well below average earnings ratio of 3.4%.

(b) Bancorporation had an abnormally large "goodwill" allowance in the balance sheet; the deduction of the $1,300,000 listed as goodwill reduced its tangible net worth to only $500,000, about 25% of the loan being requested (before interest).

(c) The Bank showed an unusually rapid increase in loans between 1977 and 1978 (from $21.1 million to $32.7 million); normal growth would be 10% to 12%.

(d) The Bank, while increasing its loan portfolio, decreased its loan loss reserves to a ratio well below 1%, the norm for banks around the country in 1978.

(e) The ratio of Bank loans to deposits in 1978 was 67%, a high ratio.

(f) The net income of Bancorporation in 1978 was $278,000, while the amount of

annual payments to the Pension Fund for the loan would have exceeded $500,000 for the first year; neither the Bank nor Bancorporation ever earned that much money in any year in its history. [4]

The Trustees' omissions went beyond their failure to evaluate the financial statements or appraise the bank stock and real estate:

(a) They failed to obtain a title report on the real estate put up as security by Angelos. Had they done so, they would have found that prior liens totalling several hundred thousand dollars had been filed. They did not contact the predecessor lender, Central National, to ascertain

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4. It should be noted that Bancorporation was not the only bank holding company looking for capital in 1979. There was a market of several hundred such companies looking for loans, most of which were in better financial condition. The return offered by Bancorporation, 1% over prime, was generally available.

Bancorporation's repayment history or the reasons Central National had refused to extend further credit. They did not ask other Chicago-area financial institutions about the Bank's reputation in the financial community.[5] They did not meet with federal or state regulatory officials to obtain information about Bancorporation or the Bank.[6]

After the loan was disbursed, the Trustees did not receive the semiannual and annual financial data required and made no demand for it. When the statements began to reflect regulatory problems with the FDIC and Federal Reserve Board and

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5. In fact, five Chicago-area banks had refused to refinance the loan.

6. Officials of the FDIC had urged a ten-point corrective action plan for the Bank only six days before the February 27, 1979 Trustees' meeting. This plan dealt with undercapitalization, poor loan-to-deposit ratio, insufficient liquidity, substandard loans, and improper lending practices.

restrictions on Bank dividend payments (the principal source of funds for loan repayment), they took no action. Finally, the interest assessed to Bancorporation was miscalculated, resulting in a loss of over $32,000 to the Pension Fund.

On March 14, 1981, the Bank was closed by federal and state regulatory officials. At that time, the sum of $1,625,000 plus interest was due to the Pension Fund. No further payments were made.

Other Unlawful Activities

Prior to its determination on the appropriate relief, the Court was presented with evidence of additional improprieties by the Trustees:

(a) A $60,000 kickback to Cody and another Trustee by a real estate agent, following the purchase of a country club by the Pension Fund. See United States v. Cody, 722 F.2d 1052 (2d Cir. 1983).

(b) A $100,000 kickback to Cody by another real estate agent following another real estate purchase. Id.

(c) The payment of salaries to union business agents even though they were not performing services for the Pension Fund.

(d) Open and notorious evasion of payments to the Pension Fund by employers, including Trustee Guercia.

Relevant Procedural Background

The private Respondents commenced their action against the Trustees on July 14, 1981.[7] The answer filed by the Trustees on October 27, 1981 did not include a demand for a jury trial. (A. 35a). On December 20, 1982, the parties entered into a stipulation authorizing an amendment to the complaint in order to add the

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7. The later action filed by the Secretary of Labor was identical to that part of the private Respondents' action which sought relief with respect to the Bancorporation loan.

Pension Fund as a defendant. The amended complaint was filed on January 13, 1983. The only change involved the caption and a paragraph describing the Pension Fund. On January 24, 1983, the Trustees served an answer to the amended complaint, including a jury demand. The third-party complaint followed shortly thereafter. (Both the jury demand and the third-party complaint were filed more than one and a half years after commencement of the action.)

On plaintiffs' motion to strike the jury demand, the District Court held that the Trustees had waived their right to a jury trial and that that right had not been revived by the amended complaint. (A. 36a-38a). The District Court also held that the complaint was equitable in nature and did not require a jury trial. Finally, the Court held that the third-party fraud complaint did not include issues common with those in the main action, eliminating

any need for the ERISA action to be tried before a jury. (A. 40a-42a).

The District Court granted a motion to sever the third-party claims since (1) pretrial discovery had been completed in the main action while process was still being served in the third-party action, (2) none of the third-party defendants had even answered yet, and (3) delay would prejudice the plaintiffs. (A. 48a).

The trial was not bifurcated on the issue of liability and damages, although a separate proceeding was held, without objection by Trustees' counsel, on the form of relief. Contrary to their assertion (Petition p. 5), the Trustees were never denied an opportunity to introduce mitigating evidence. [8] One witness, called by the Pension Fund to testify about post-

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8. Judge Mishler, during trial, told counsel: "I will take what you give me, I will take whatever you offer."

default litigation, was not allowed to testify when plaintiffs stipulated that the Trustees had satisfactorily pursued post-default remedies.

The District Court found that the Trustees breached their fiduciary obligations by relying solely on the information and representations given by the borrowers and failing to conduct an independent investigation. (A. 71a).

Prior to determining the remedy and entering judgment, the Court received affidavits from plaintiff Lawrence Kudla and from counsel to the Trustees. Since there seemed to be no factual disputes, an evidentiary hearing was unnecessary.

Each of these actions by the District Court was affirmed by the Court of Appeals.

REASONS FOR DENYING A WRIT

I

The severance of Petitioners' third-party claims from Respondents' equitable claims was neither an abuse of discretion nor a violation of Petitioners' right to a trial by jury.

A. The Trustees Waived Their Right To A Jury Trial.

To bring themselves under this Court's rule in Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959), Petitioners must first have properly demanded a jury trial. They neglect to tell the Court that they did not.

In answering the complaint in September 1981, the Trustees did not demand a jury trial. Their first such demand was made in their January 1983 answer to the amended complaint. No motion was ever made for leave to file such a demand. The issue was addressed by the District Court on a motion to strike the demand.

Rule 38(b) of the Federal Rules of Civil Procedure requires that a demand for

a jury trial be served within ten days after service of the "last pleading directed to such issue." If a demand is not filed, it is waived. The amendment of a complaint does not revive the right, if waived, to demand a trial on issues fairly raised in the original pleadings. State Mutual Life v. Arthur Andersen & Co., 581 F.2d 1045, 1049 (2d Cir. 1978); Walton v. Eaton, 563 F.2d 66 (3d Cir. 1977); Moore v. U.S., 196 F.2d 906 (5th Cir. 1952); Olund v. Swarthout, 459 F.2d 999 (6th Cir. 1972), cert. denied, 409 U.S. 1008 (1973); Trixler Brokerage Co. v. Ralston Purina Co., 505 F.2d 1045 (9th Cir. 1974); Ward v. Brown, 301 F.2d 445 (10th Cir. 1962); Railex Corp. v. Joseph Guss & Sons, Inc., 40 F.R.D. 119 (D.D.C. 1966), affirmed, 382 F.2d 179, 127 U.S. App. D.C. 230 (1967).

In the instant action no new issues were added by the First Amended Complaint -- its purpose was to add a new party, the

Pension Fund, which the Trustees asserted was an indispensable party. The Trustees offered no justification for the year and a half delay and were properly denied a jury trial.

B. Even If Petitioners Had Not Waived A Jury Trial They Were Not Entitled To One.

1. The Severance Of The Main Action From The Third-Party Action Was Proper.

The private respondents commenced their action in July 1981. Third-party complaints were not filed in their case until January 1983, eighteen months later. At the time of the ruling (less than three weeks before trial), the parties in the main action had completed all discovery and were ready for trial. At the same time, Petitioners had not even served all of the third-party defendants. The four who were served had not answered and were challenging the court's in personam jurisdiction. Discovery had not yet

commenced and trial was at least a year off. [9] The discovery and trial of the third-party claims involved complex issues having no relevance to the issues in the main action. Continued joinder promised to invite confusion and delay, a clear frustration of efficient justice.

Delay of the trial would have long postponed the remedy sought by the plaintiffs: removal of the Trustees. Every day they remained in office compounded the potential harm to the Pension Fund participants. Given the persistent nature of their misconduct, additional delays in the proceedings threatened the integrity of the Pension Fund.

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9. In fact, at this date, one and one half years later, the action is still in a preliminary stage.

2. The Claims In The Main Action Were Purely Equitable In Nature.

It is well established that actions seeking restitution for a breach of fiduciary duty are equitable in nature. S.E.C. v. Commonwealth Chemical Sec., 574 F.2d 90, 95 (2d Cir. 1978). ERISA Section 409(a), 29 U.S.C. § 1109(a), the statute governing this action, explicitly refers to "equitable and remedial relief." The Seventh Amendment right of jury trial does not attach to matters lying within the Court's equity jurisdiction. Katchen v. Landy, 382 U.S. 323, 337 (1966). Accordingly, there is no right to a jury trial of ERISA actions against trustees seeking the equitable remedy of restitution.[10] See also In re Vorpahl, 695 F.2d 318, 320-22 (8th Cir. 1982); Calamia v. Spivey, 632 F.2d 318, 320-22 (5th Cir. 1980); Wardle v. Central

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10. Petitioners do not challenge the holding of the Court of Appeals in this respect.

States, Southeast & Southeast Areas Pension Fund, 627 F.2d 820, 829-30 (7th Cir. 1980), cert. denied, 449 U.S. 1112 (1981).

3. The Severance Of The Third-Party Action Did Not Deny Petitioners Their Right To A Jury Trial.

Petitioners argue that there were factual issues common to the main action and the third-party complaints. This, they assert, required that the main action be tried before a jury because of a potential denial of their Seventh Amendment rights through the later application of the doctrine of collateral estoppel.

The District Court found that the issues in the main action against the Trustees were not the same as the issues in the third-party actions. (A. 48a). The issue of fraudulent disclosure raised by the Trustees in the third-party action was deemed "separate," "unrelated," and of "doubtful relevancy" to the question of the Trustees' prudence -- the subject

matter of the main claim.[11] The core facts involved in the trial concerned the actions taken by the Trustees to investigate, review and evaluate Bancorporation's loan proposal other than their conversations with the Bancorporation directors. Given the lack of relationship between the issues in the main case and the third-party complaint, the District Court was not wrong in denying a jury trial on the severed equitable portion of the case.

To the extent that issues may later arise in the third-party action which may invite the application of collateral estoppel, this Court's decision in Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) clearly governs. The Court recognized in Parklane that its holdings in Beacon Theatres v. Westover, 359 U.S. 500 (1959),

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11. At trial, the Trustees did not even raise the allegation that they had been defrauded as a defense to the allegations of the complaint.

"enunciated no more than a general prudential rule," Id. at 334, and that

> "'... there might be situations in which the Court could proceed to resolve the equitable claim first even though the results might be dispositive of the issues involved in the legal claim.'"

439 U.S. at 335, citing Katchen v. Landy, supra at 339.

In Parklane Hosiery, this Court held that an equitable determination can have collateral estoppel effect in a subsequent legal action and that this estoppel does not violate the Seventh Amendment. See also Crowder v. Lash, 687 F.2d 996, 1009-1011 (7th Cir. 1982); Consolidated Express Inc. v. N.Y. Shipping Assn., Inc., 602 F.2d 491 (3d Cir. 1979), vacated on other grounds, 448 U.S. 902 (1980).

The Court thus distinguished Beacon Theatres, which involved a counterclaim. The third-party complaint in the instant action has more in common with the subsequent action addressed in Parklane Hosiery

than the counterclaim in Beacon Theatres. The third-party complaint was brought one and a half years after the main action commenced and was in the most preliminary of stages when the trial of the main action was held. At the time of trial, answers had not been interposed and affirmative defenses concerning justifiable reliance had not yet been raised by the third-party defendants.

These facts, combined with the District Court's finding that the tactic of bringing a third-party complaint was employed for the "purpose of delay and employed in bad faith" (A. 107a), weigh heavily against utilization of this case as a vehicle to consider the expansion of the prudential rule of Beacon Theatres.

II

The relief granted by the District Court and affirmed by the Court of Appeals was well within its discretion and was permitted by ERISA.

Despite their repeated violations of the fiduciary provisions of ERISA, and the fact that the Bancorporation default deprived the Pension Fund of other opportunities to gain a high rate of return on an investment, the Trustees complain that the District Court was unjustified in removing them from office and assessing prejudgment interest in an amount equal to that which the Pension Fund would have received had Bancorporation not defaulted. Given the nature and extent of the Trustees' violations and the courts' broad equitable powers under ERISA, the Trustees are surely mistaken.

The remedial provisions of ERISA give the courts broad powers over fiduciaries and employee benefit plans in the shaping

of remedial relief. Section 502(a) of ERISA, 29 U.S.C. § 1132(a), provides:

> "A civil action may be brought ... (3) by a participant, beneficiary, or fiduciary (a) to enjoin any act or practice which violates any term or provision of this title or the terms of the plan, or (b) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title ..." (emphasis added).

Section 409 of ERISA, 29 U.S.C. § 1109, provides:

> "Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary, and shall be subject to such other equitable or remedial relief that the court may deem appropriate, including removal of such fiduciary ...." (emphasis added).

The reports of the various committees concerning Section 409 of ERISA make it clear that Congress intended to provide the courts with broad remedies for

redressing the interests of participants and beneficiaries when they have been adversely affected by breaches of fiduciary duty.

> "The enforcement provisions have been designed specifically to provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of the Retirement Income Security for Employees Act .... The intent of the committee is to provide the full range of legal and equitable remedies available in both state and federal courts ..."

S. Rep. No. 83-127, 93rd Cong., 1st Sess., Reprinted [1974], U.S. Code Cong. & Admin. News, pp. 4838, 4871. Also, see generally Marshall v. Snyder, 572 F.2d 894, 901 (2d Cir. 1978); Eaves v. Penn, 587 F.2d 453, 462 (10th Cir. 1978); Iron Workers Local No. 272 v. Bowen, 624 F.2d 1255, 1262 (5th Cir. 1980); Marshall v. Kelly, 465 F. Supp. 341, 354 (W.D. Okla. 1978).

In developing a law of remedies, Congress intended the federal courts to

draw upon the principles of traditional trust law:

> "The objectives of these provisions are to make applicable the law of trusts; ... and to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets; and to provide effective remedies for breaches of trust."

Statement of the Honorable Harrison A. Williams, Jr., 120 Cong. Rec. S-15737, August 22, 1974, Reprinted [1974], U.S. Code Cong. & Admin. News, pp. 5177, 5186.

Traditional trust law provides for broad and flexible equitable remedies in cases involving violations of fiduciary duty. Generally, the court has a duty to fashion the remedy which is most advantageous to the participants and most conducive to effectuating the purposes of the trust. Eaves v. Penn, supra.

The use of the words "other appropriate equitable relief" illustrates

Congress's intention to allow the courts great flexibility in fashioning such relief. This Court, in Hall v. Cole, 412 U.S. 1 (1974), interpreted the breadth of relief available under Section 102 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 412, which similarly authorizes the courts to grant "such relief . . . as may be appropriate." These words were construed as a "broad mandate to the courts." The Court further stated that any attempt by Congress "to spell out all of the remedies available under § 102 would create the 'danger that those remedies not listed might be proscribed with the result that the courts would be fettered in their efforts to grant relief according to the necessities of the case.'" Id. at 11. The Trustees would have this Court engage in such limitations. The Court should decline to do so.

A. Removal Of The Trustees For Repeated Egregious Violations Of The ERISA Fiduciary Standards Was Warranted.

There is no conflict in the Circuits as to whether the removal of fiduciaries from their positions with employee benefit plans governed by ERISA is appropriate where they have engaged in "repeated or substantial violation[s] of [their] responsibilities," or "threatened dissipation of [plan] assets." Marshall v. Snyder, 572 F.2d 894, 901. Iron Workers Local No. 272 v. Bowen, supra. See also S. Rep. No. 383, 93 Cong., 2d Sess., reprinted in 1974, U.S. Code Cong. & Admin. News 4890, 4989 (set out in the opinion of the Court of Appeals at A. 23a).

The breaches of trust committed by Petitioners were not, as they would have this Court believe, two isolated incidents of imprudence involving "mere error[s] in their business judgment." (Petition, p. 16). The violations of law were flagrant

and involved great risk to the Pension Plan funds. The commitment of 65% of the Pension Fund assets to a risky loan involving the construction of a Las Vegas casino, the disbursement of $2,000,000 on 48 hours notice to an unknown and uninvestigated suburban Chicago bank on the verge of failure, the receipt of $160,000 in kickbacks by the Pension Fund manager and Trustee, and unlawful payments to union business agents, and the unlawful expenditure of Pension Fund assets to defend these unlawful activities, amounts to a pattern of persistent, reckless, and lawless conduct which could only be properly remedied by removal from office. The District Court's action was remedial, not punitive. As such, it was a proper exercise of the court's discretion.

B. The Calculation Of Prejudgment Interest Was A Proper Exercise Of The District Court's Discretion.

The District Court's assessment of prejudgment interest at the rate provided for in the Bancorporation loan was a proper exercise of its discretion.

ERISA grants the Court wide discretion to shape the relief necessary to make a pension fund whole. Gilliam v. Edwards, 492 F. Supp. 1255, 1266-1267 (D.N.J. 1980). This includes the assessment of interest against a trustee found liable for wrongful disposition of trust funds from the time of loss. Id. The determination of the appropriate rate of interest to compensate the beneficiaries for the Trustees' breach of duty is committed to the Court's discretion. Donovan v. Bryans, 566 F. Supp. 1258, 1265 (E.D. Pa. 1983).

Petitioners suggest that the rate of interest to be assessed should correspond to the Pension Fund's average annual rate

of return -- 8% to 9%. This figure, however, does not reflect an accurate annual rate of return on money newly invested during the period between the loan default and the entry of judgment. The Pension Fund's average annual rate of return was (and remains) handicapped as a result of longstanding but low-yielding investments in the Pension Fund's portfolio, including previously purchased low-yielding corporate bonds.

For the Court's remedy to be appropriate, the rate of interest to be assessed must reflect a return on newly invested funds during 1980-1983 as opposed to the rate of return on sluggish investments made previous to the period in question.

Expert testimony at trial revealed that at the time the Bancorporation loan was made, "several hundred" other banking institutions were in the market to borrow at a probable rate of 1% above prime. The

terms of the Bancorporation loan were not unusual given the high interest rates in effect for all borrowers during the 1979-1983 period.

Had the money been invested prudently, the participants and beneficiaries of the Pension Fund would have reaped the benefit of the then prevailing high interest rates. As a result of Petitioners' imprudence and mismanagement, the participants and beneficiaries were denied that opportunity. In order to make the Pension Fund whole, the benefit that was to be gained from the now lost opportunity had to be restored. This is what the District Court did.[12]

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12. The assertion by Petitioners that their conduct was not egregious and that the losses to the Pension Fund occurred despite their good faith efforts is belied by the facts, as reviewed above, and the reckless manner in which they committed the Pension Fund to the Bancorporation loan.

C. The District Court Did Make Proper Provision For Set-Offs.

In its opinion concerning the form of relief, the District Court stated:

> "Payments received by the Fund on account of the loan will be credited against the judgment sum."

There was no requirement, in law or equity, that the District Court refrain from entering judgment until the Trustees completed their various efforts to collect against the loan collateral and in their common law fraud actions against the Bancorporation directors. Whatever money the Petitioners recover will be set off against the judgment sum.

As one court noted, when considering a similar factual situation:

> "The possibility that either the Plan or participants might be made whole through other proceedings ... does not require the Court to withhold the remedy provided in these proceedings. The defendants are in no danger of multiple judgments, and equity can resolve any contribution or indemnity to which

> they may become entitled by virtue of making good the loss to the Plan."

Freund v. Marshall and Ilsley Bank, 485 F. Supp. 629, 643 (W.D. Wis. 1979).

D. The Relief Granted Was Appropriate And Was Not Punitive.

In addition to arguing that each form of relief granted by the District Court was unwarranted, Petitioners, for the first time, argue that the relief amounted to punitive damages and should be vacated as contrary to ERISA. That issue was not raised in the Court of Appeals and therefore is not properly before this Court. Ramsey v. United Mine Workers, 401 U.S. 302, 312 (1971).

In fact, the District Court itself struck plaintiffs' demand for punitive damages. (A. 47a). The relief granted -- removal of the Trustees from office, restitution and the assessment of interest -- was remedial in nature and was well

within the equitable powers of the District Court.

* * *

The questions raised by the District Court's grant of relief, as affirmed by the Court of Appeals, are hardly appropriate for this Court's consideration.

Conclusion

For the foregoing reasons, the petition for certiorari should be denied.

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Respectfully submitted,

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